Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Schools and Libraries Universal Service	)	CC Docket No. 02-6
Support Mechanism	)	

COMMENTS OF THE COALITION FOR E-RATE REFORM

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SUMMARY

The Coalition for E-rate Reform (the "Coalition") is filing these comments in response to the Commission's Notice of Proposed Rule Making in this docket. The Coalition is comprised of small independent service providers that participate in the E-rate program and will be directly affected by the Commission's determinations in this proceeding.

In these comments, the Coalition urges the Commission to reject as unworkable the proposal to adopt an online eligible services list. Instead, the Commission and the Schools and Libraries Division ("SLD") should focus their efforts on improving the existing Eligible Services list and update it regularly, based on comments from the public. The Coalition also urges SLD to disclose the list of eligible products that it uses when making eligibility determinations.

Coalition members provide high speed Internet access to schools via private fiber networks, which many schools have determined to be the most cost-effective method of obtaining Internet access. The Commission should support efforts to provide high speed Internet access through the most cost-effective means, regardless of whether those means involve using a private fiber network provider or the purchase of equipment by the school. Schools should not be penalized for choosing the latter.

In addition, Coalition members have experienced unjust and unreasonable requests from SLD regarding their methods of delivering Internet access. The Commission should direct SLD to limit its inquiries to assessing whether an applicant is receiving Internet access in accordance with the rules.

The Coalition agrees that bundled Internet access should be eligible for discount, provided it is the most cost-effective means of receiving Internet access. Any concerns that the Commission may have about service providers maximizing revenues will be alleviated by the

requirement that the service be cost-effective. Finally, with respect to eligible services, the Coalition believes that voice mail should be considered an eligible service because it represents an insignificant cost to the E-rate program and will relieve applicants and SLD from the task of vetting telephone invoices.

The Coalition also addresses several miscellaneous issues, including its support for the proposal to allow schools to decide whether to use the BEAR form or ask the provider to use the SPIF form for reimbursement. The Coalition also supports the expansion of the *Alaska* Order to allow after-hours access. Finally, the Coalition supports the eligibility of non-traditional schools to receive E-rate funding.

With respect to the appeals process, the Coalition supports a permanent 60-day deadline for appeals but urges reform with regard to SLD's and the Commission's decision deadlines. Deadlines are also an issue during the Program Integrity Assurance review, and the Coalition urges the Commission to establish rational uniform deadlines during the PIA process. The Commission should fully fund all successful appeals and should not contemplate any pro-rata sharing of E-rate appeal funds or other dilution of a successful appeal. Finally, the Coalition proposes that all unused Priority One funds within a given funding year should be redirected to fund as many Priority Two requests as possible. To the extent that there are any remaining funds after fully funding all Priority Two requests, the unused funds should be rolled over into the next funding year.

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The Coalition for E-rate Reform (the "Coalition"), by its attorneys and pursuant to Section 1.415(b) of the Commission's rules, 47 C.F.R. § 1.415(b), hereby submits its comments in response to the above-captioned Notice of Proposed Rule Making (the "NPRM").[1]

I. Introduction

The Coalition welcomes the Commission's decision to solicit public comment on ways to improve the current rules and policies governing the schools and libraries universal support mechanism. As a group of independent service providers providing a variety of discounted Internet access services to eligible schools and consortia of eligible schools that use discounted Internet access service, the Coalition is in a strong position to provide the Commission with ways in which the administration of the support mechanism can be improved. In the sections below, the Coalition responds to many of the specific issues raised in the NPRM, as well as several issues of great importance that have not yet been addressed by the Commission.

[1] *Schools and Libraries Universal Support Mechanism*, Notice of Proposed Rule Making and Order, CC Docket No. 02-6, FCC 02-8 (rel. Jan. 25, 2002).

II. Eligible Services

A. The Commission Should Not Adopt an Online Eligible Services List

The Commission has asked for comments on alternatives to the current Eligible Services list maintained by the Schools and Libraries Division ("SLD"). One possible alternative would be to establish a computerized eligible services list that would be accessible online. Applicants could use this list to select pre-approved products or services for their 471 application. Any product or service that does not appear on the online list could not be selected for the 471 application.

While the Coalition in general welcomes the trend toward making all aspects of the E-rate program electronic, in this particular instance it is highly concerned that a drop-down online list would create numerous problems for applicants and service providers alike. For instance, there are currently 228 separate listings on the SLD's Eligible Services list, many with subparts.[2] Of these numerous listings, it is not always clear which item should be selected by applicants for placement on the Form 471. Moreover, many items in the Eligible Services list cross-reference one another, making it difficult to imagine how a drop-down menu list would work in an online format.

Another problem presented by a drop-down menu of eligible services is that it precludes a school or library from applying for services which, while not listed, later are determined by the Commission to be an eligible service. This situation has arisen in the past, where the Commission has reversed an SLD determination that an applicant's request was for an ineligible service.[3] If applicants are not given eligible service options other than those presented by SLD, the E-rate program will cut off access to new products and services.

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[2] *See* http://www.sl.universalservice.org/data/pdf/EligibleServicesList_101701.pdf.

[3] *See, e.g.,* Request for Review of the Decision of the Universal Service Administrator by White Sulphur Springs School District White Sulphur Springs, Montana; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket Nos. 96-45, 97-21, DA 99-2537, (continued)

The Coalition believes that the Commission and the SLD should instead focus their efforts on continuing to update and refine the current Eligible Services list that is publicly accessible on the SLD website. SLD has done a tremendous job over the past two years clarifying the list, removing ambiguities, and incorporating decisions by the Commission. The Coalition urges SLD to continue this effort. As part of such an effort, the Coalition suggests that the SLD remove the ineligible items included in the list and provide those items in a separate "Ineligible Services" list. This will assist schools and libraries during the Form 471 process by ensuring that they look only to the Eligible Services list for eligible services. Should the need arise, they may refer to the Ineligible Services list.

To keep the Eligible Services list current, SLD to the Commission should routinely solicit public comment for suggestions concerning the list. Much like the NPRM process, SLD could request that comments and reply comments be submitted by a certain date and, based upon the public's input, SLD could then update the list as necessary, but in no event should the list be updated less than once a year.

B. The SLD Should Disclose the Eligible Products List

Based on conversations that members of the Coalition have had with SLD staff members, and that the Coalition's legal counsel has had with the General Counsel's office for SLD, it appears that SLD is actively using an undisclosed list of eligible products in order to determine whether the use of a specific piece of equipment renders a service provider's service ineligible. The SLD's General Counsel has refused to disclose this list to the public.

As an initial matter, it is indefensible for an agent of a federal independent agency to refuse to disclose to the public the procedures and materials it uses in order to assess the applications

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15 FCC Rcd 3396, para. 7 (rel. Nov. 16, 1999) (router determined by SLD to be ineligible later held eligible by (continued)

before it. The SLD should be required to provide service providers with the list it refers to when making eligibility determinations. For instance, information as to whether a Cisco 2600 series router is considered by SLD to be an ineligible or eligible product should be readily available to the public. Although the SLD has indicated that it will disclose whether a particular piece of equipment is on the list if so requested in an e-mail, this procedure hardly compares to a fully disclosed list of eligible products that can be reviewed by all service providers so that they can make necessary determinations as to appropriate equipment purchases.

If SLD is concerned as to potential liability for failing to name a piece of equipment that is otherwise eligible, it can readily resolve this by indicating on the publicly distributed list that the list is "subject to revision by SLD" and is not exhaustive. But such concerns should not deter SLD from fully disclosing the materials it uses to make substantive eligibility determinations.

III. Private Fiber Networks and SLD Review of Such Networks.

A. Private Fiber Networks Can Be the Most Cost-effective Method for Internet Access Delivery

The Commission has sought comment on the extent to which service providers should continue to be allowed to provide Internet access via Wide Area Networks ("WANs"). Currently, a WAN is considered to be an eligible service only if it is provided over leased telephone lines. Such a WAN is considered a Priority One telecommunications service, and not a Priority Two internal connection. The Commission will allow a school to obtain funding for non-recurring equipment and buildout expenses associated with a WAN, provided the expenses are spread out over at least a three-year period. Some parties have complained that the Commission's treatment of leased-line WANs as Priority One services has placed a drain on the E-rate program's resources.

Commission).

The Coalition strongly disagrees with these parties. Members of the Coalition provide high speed Internet access to schools via private fiber networks that are far more cost-effective than paying the tariffed rates of public switched network carriers and in fact require less E-rate funding. It is for these reasons that many schools have chosen to receive Internet access from Coalition members. Furthermore, if a school can demonstrate that it is more cost-effective to purchase private fiber network equipment to obtain Internet access, the Commission should allow the school to do so, and should not penalize the school by categorizing the equipment as Priority Two internal connections for which the vast majority of schools are ineligible. This proposal would necessarily require overturning the Commission's *Tennessee* Order which established this biased regime.[4]

In sum, applicants should be free to choose any provider who is capable of providing the most cost-effective Internet access service, regardless of the method used to deliver such service. Or, if the school determines that it is most cost-effective to either obtain dedicated fiber network services from a Coalition member or purchase the equipment itself, the school should be permitted to do so without penalty. In the short-term, these options are no more expensive than choosing a wireline carrier's tariffed rate services, and in the long-term, once the cost of the fiber network is paid for, the continuing costs for connection are reduced significantly.

B. The Commission Should Direct SLD to End Its Unfair, Discriminatory Scrutiny of Small Independent Service Providers

It has been the experience of the Coalition that SLD persistently requires small independent service providers to itemize, in excruciating detail, the Internet access services they provide to schools. The Coalition believes that these small providers are being singled out by SLD for scrutiny without reason. Many small providers have found cost-effective methods for providing superior

[4] *See Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator*, Order, CC Docket Nos. 96-45, 97-21, FCC 99-216 (rel. Aug. 11, 1999).

Internet access service to schools using private fiber networks. Simply because the provider does not use the public switched network should not subject the provider (and the school selecting the provider) to unfair demands and inquiries by SLD. Although the Coalition respects the Commission's desire to ensure that the E-rate program is free from fraud and abuse, there is a point at which SLD inquiries become overbearing and create a de facto preference for wireline common carriers. SLD's job should be simply to determine whether the school is obtaining Internet access consistent with the rules. It is not appropriate for SLD to be making decisions on what is the "best" provider. That determination should be left to the schools pursuant to the competitive bidding process.

IV. Voice Mail Should Be Considered an Eligible Service

The Commission has proposed that voice mail be considered an eligible service. The Coalition agrees with the Commission and its comparison of voice mail to e-mail, which is eligible. It is expensive and time consuming for schools to have to scrutinize every telephone bill in order to extract voice mail costs and for SLD to subsequently verify that such costs have been removed. Moreover, the added cost to E-rate program for making voice mail an eligible service will be minimal.

V. Internet Access Bundled with Content

Currently schools receiving discounts for Internet access cannot receive discounts for any content bundled with the Internet access. Some schools have argued that there is a disincentive to use a provider that offers technically superior service but bundles content. The Commission has recognized the disincentive built into the current rules, and is seeking comment on how the program can be changed.

The Coalition agrees that bundled content should be considered an eligible service if it is the most cost-effective means of receiving Internet access. The Commission should encourage packages when a service provider can bundle certain content such as virus protection, firewalls, content filtering, and other services into its Internet access package and still remain a school's most cost-effective method of receiving Internet access.

The Commission expressed concern that allowing certain content could lead service providers to attempt to maximize revenues. However, this possibility is minimized if the Commission retains the requirement that the Internet access package remain the most cost-effective means of providing access. In determining cost-effectiveness, the primary factor should be price, but other factors such as technical excellence and a superior Internet connection speed should be considered. A regime based on cost-effectiveness will actually lead to more competition among the service providers, which will benefit applicants and reduce the drain on E-rate funds. Finally, allowing certain content to be bundled will reduce SLD's administrative oversight burdens and allow SLD staff to focus on the more important issue of whether the service is cost-effective.

VI. Choice of Payment Method

Currently it is not clear from the Commission's rules whether the provider or the applicant may make the final determination of whether to use the BEAR Form or the SPIF form for reimbursement purposes. The Coalition believes that applicants should have the authority to select their reimbursement option from the service provider. Service providers are free to choose whether or not to participate in the E-rate program, and as a service to schools and libraries, who are the statutory beneficiaries of the program. Therefore, service providers should be prepared to submit SPIF forms to the extent that an applicant prefers that method.

However, the Commission should establish a uniform time period for reimbursements. Currently SLD has 30 days to submit reimbursements to service providers. The Coalition believes that service providers should be given the same period of time in which to reimburse the applicants. A 10 day period is simply insufficient in many cases due to service providers' internal administrative procedures.

VII. Use of Excess Service in Remote Areas

A. After Hours Uses

Services received under E-rate may only be used for "educational purposes." Some services however, are non-usage sensitive, and when they are not being used for educational purposes they go unused. The State of Alaska recently received a waiver to allow non-students to use a school's Internet access or other non-usage sensitive services under the following conditions: 1) the services are used primarily for educational purposes; 2) the community lacks local or toll-free dial up access to the Internet; and 3) the services are used by non-students only during non-school hours.

The Coalition believes that there are other situations that would warrant excess services to be used. A school should be permitted to provide Internet access to the community when school is not in session. In reality, school buildings are in use for only one third of the day, while typically the Internet access they receive from service providers is available 24 hours a day at no additional cost. In many ways, after the school day is ended a school resembles a library. The community should be permitted to use the school's facilities for Internet access provided: 1) there are no additional costs associated with after-hours use; 2) the costs used by the school in calculating its E-rate application do not factor in after-hours use; 3) the services to be used by the community would be provided on a non-usage sensitive basis; 4) the services are available to the community only during non-school hours; 5) the school does not profit in any way from the excess use; and 6)

priority use of the services is based on a set of neutral criteria that do not prioritize based on expectations of particular benefits to the school or surrounding community. Schools should be required to certify that any excess uses of the services they receive satisfy these criteria. To the extent that the Commission and/or SLD is informed by members of the community of any abuses of such a system, the Commission may then take appropriate action following an investigation. Appropriate action could include a denial of E-rate funding for the year, or depending on the severity of the problem, for future years as well.

B. The Commission Should Not Discriminate Against Non-traditional Schools

In many remote communities, traditional schools are not an option for students. For these students, non-traditional schools such as electronic classroom schools, where the students participate in classrooms online via an Internet connection to their personal residence, are a viable option. The current SLD policy dictates that such schools are not eligible for E-rate funding because a personal residence is not a "place of instruction." However, the SLD's policy is inconsistent with both the Communications Act of 1934, as amended (the "Act"), and the Commission's regulations, to the extent that SLD would deny funding for services provided by an eligible entity at a personal residence. There is no such prohibition against discounts for services from personal residences in the Act, the *Universal Service Order*, or in any subsequent Commission decision. Moreover, the SLD's policy does not acknowledge that a personal residence can be a location that simultaneously serves as a "place of instruction." In the electronic classroom environment, the students' personal residences become the "classrooms" during school hours and thus become places of instruction. Students attending such schools should not be disadvantaged in comparison with their peers attending traditional classrooms simply because they "attend" class in a different way. If the place of instruction satisfies all

other criteria of a classroom, it should not be discriminated against. These non-traditional classrooms address a serious educational and societal goal and should not be discouraged by the Commission.

To the extent that the Commission is concerned that insufficient funding is available to fund such schools, then the Commission should revisit the manner in which it determines E-rate eligibility for all schools. An equitable distribution method is one which distributes E-rate funding to eligible schools in a non-discriminatory manner, and without regard to the way in which a school's students attend classes.

VIII. Appeals

A. A Permanent Extension of the 60-day Deadline Is Warranted

The Commission is seeking comment on whether to permanently extend the 30-day appeal deadline to 60 days. Currently, and until further notice, any appeal due on or after September 12, 2001 is due within 60 days. The Coalition believes that a permanent change to 60 days is rational given the amount of work involved in preparing such an appeal. Well-prepared appeals will likely be easier for the Commission to assess as well.

In addition, the Commission should revisit its own appeal review timelines. Currently the Commission is afforded 90 days to issue a decision on appeal, while SLD has no timeline at all. In practice, however, if the Commission fails to issue a decision within 90 days, it can either formally extends its own deadline or simply issues a decision after more than 90 days. These policies require reform. For budgeting purposes, applicants and service providers need assurances as to the expected amount of time for review of an appeal. Open-ended appeal periods are not conducive to a smooth running of the E-rate program, nor are unreasonably short appeal timelines. Moreover, if the Commission limits the appeal period, the problem of unused appeal funds will largely go away.

It may be the case that the Commission can retain its current rules if it disposes of procedurally defective appeals in one decision each month. For instance, it appears that numerous appeals are dismissed for: 1) failing to file the appeal prior to the deadline; 2) violating the 28-day waiting period during the bidding process; and 3) failing to use the proper application form. These appeals clutter the docket and should be quickly dismissed through one decision per month.

Concurrent with these changes, the Commission should require SLD to establish a tracking system for applications and appeals. Much like the Federal Express tracking system, an applicant should be able to access online the status of its application and appeal, if applicable, by providing the relevant FRN number. Each applicant should be provided with an account identification number and password allowing the applicant to track each step of the process and determine where an application (or appeal) is in the process, including an estimated time of decision. Such a system would significantly reduce the number of inquiry calls to SLD from schools and service providers, thus allowing SLD staff members to conduct other important administrative tasks.

B. Program Integrity Assurance Reforms

In addition, the Commission needs to direct SLD to implement reasonable timelines during the Program Integrity Assurance ("PIA") process. Currently, some school districts are required to provide SLD with requested PIA information within 7 days or risk losing their funding. In many circumstances, 7 days is simply an unreasonable amount of time. Schools must be given a sufficient amount of time to work with the service provider and to gather and provide the requested information to SLD. A "reasonable" timeline will vary depending on the nature of the request. While a response to some requests will reasonably take two to three days, in many other cases a response to a complex request could take two or more weeks. A standard fourteen day response period should be established. In the event that it becomes reasonably necessary, applicants should

be permitted to request additional time to respond, up to a maximum of one additional week. Such a policy would forward SLD's goal of processing applications expeditiously, while affording schools a rational amount of time in which to respond to SLD complaints.

In situations where SLD has follow-up questions after reviewing a response, SLD's policy has been to demand a response to the follow-up questions within the 7 day period. Thus, for example, if a school submits its response to SLD on Day 6, and SLD has follow-up questions, the school is afforded only *one day* to respond to the follow-up questions. This SLD policy is completely arbitrary and capricious. SLD should provide applicants a reasonable amount of time to respond to follow-up questions. The same timeline outlined above should apply.

Finally, SLD should adopt a formal policy requiring all communications to be in writing. The Coalition has learned that in certain situations SLD has refused to pose its questions in writing, and has insisted that it is permitted to ask questions by telephone. This policy is baseless. In order to establish a meaningful record and avoid confusion, all communications to and from SLD must be in writing.

C. Funding of Successful Appeals

Finally, the Coalition firmly believes that any party aggrieved by a decision of the SLD has a right to appeal to the Commission. If successful, the appellant should be entitled to full funding. There should be no pro-rata funding for successful appellants. It would be arbitrary and capricious to penalize parties who, through no fault of their own, are forced to file an appeal. Accordingly, regardless of the method used, SLD should be required to retain sufficient funding to fully fund all successful appeals.

IX. Unused Funds

For various reasons, a certain amount of E-rate funding is committed but goes unused. As of June 2001, the amount of unused E-rate funds totaled $940 million for the first two funding years alone. SLD projects that only about 71 percent of Year 3 funds will be disbursed.

The Coalitions believes that much of the excess funds will disappear in future years if the Commission reforms its appeals procedures. In any event, the Coalition strongly believes that any unused funds should remain in the E-rate program and should not be redistributed to carriers. Carriers are free to recover their contributions to the fund from their customers. Carriers should not be allowed to double dip by imposing a universal service charge on their customers and also receiving reimbursements from the E-rate program.

Instead, the Coalition urges the Commission to adopt procedures permitting unused Priority One funds within a given funding year to be attributed to Priority Two requests made during that funding year. For example, if SLD determines by a date certain (e.g., August 31) that a portion of requested Priority One funds went unused, SLD could then redirect those funds to Priority Two requests. Applicants who become eligible for the Priority Two funds would be given until November 1 to spend the funds. Any funds left over on November 1, if any, could then be rolled over into the following year. The Coalition believes this approach would help alleviate the unavailability of Priority Two funds for most applicants, and reduce demands for Priority One services.

X. Conclusion.

The Coalition commends the Commission and SLD for their implementation of the E-rate program, and welcomes the Commission's investigation into ways to improve the program. The Coalition submits that the adoption of the proposals set forth in these comments will assist in improving the fairness and functioning of the program in the coming years.

Respectfully submitted,

THE COALITION FOR E-RATE REFORM

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